No. 12546.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

JACK MAU,

Appellant,

vs.

PAUL W. SAMPSELL, Trustee in Bankruptcy of the Estate of Jack Mau, Bankrupt,

Appellee.

APPELLANT'S OPENING BRIEF.

QUITTNER, STUTMAN & SHULAN,
639 South Spring Street, Los Angeles 14,
Attorneys for Appellant.

JACK TENNER,
Of Counsel.

Parker & Company, Law Printers, Los Angeles. Phone MA. 6-9171.

TOPICAL INDEX

PAGE

TABLE OF AUTHORITIES CITED

Cases

Miscellaneous

STATUTES PAGE

TEXTBOOKS

No. 12206

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

JACK MAU,

Appellant,

vs.

PAUL W. SAMPSELL, Trustee in Bankruptcy of the Estate of Jack Mau, Bankrupt,

Appellee.

APPELLANT'S OPENING BRIEF.

I.

Jurisdictional Statements.

Appellant filed a voluntary petition in bankruptcy in the District Court of the United States, Southern District of California, Central Division, on November 15, 1948 [R. 2, 3, 4] and was adjudicated a bankrupt on November 15, 1948, by an order of adjudication and of general reference on November 15, 1948 [R. 4 and 5].

Thereafter, Amended Specifications of Objections to the Discharge of the Bankrupt were filed by the Trustee on July 8, 1949 [R. 6 to 9].

Evidence was offered in support of Specification No. I on the 10th day of May, 1949, and on the 9th day of

September, 1949, and the Referee filed Findings of Fact and Conclusions of Law on Objection to Discharge on the 4th day of November, 1949 [R. 9 to 13].

There was an order entered on the eighth day of November, 1949, denying the discharge of the bankrupt [R. 13 and 14].

A petition for review of the Referee's order by the district judge was signed on the 17th day of November, 1949 [R. 14 to 20] which review was denied and the Referee's findings and orders sustained by order of Judge Pierson M. Hall, signed the 2nd day of March, 1950, and entered in Judgment Book 64, page 713, on the 28th day of March, 1950 [R. 32 and 33].

This appeal is taken from the Judgment and Order of the Court adopting the Findings of Fact and Conclusions of Law of the Referee and the Order denying the Bankrupt's Discharge.

Within the time allowed by law, your appellant filed a Notice of Appeal, to-wit, on the 13th day of March, 1950 [R. 34] and further, a Corrected Notice of Appeal was filed on the 28th day of March, 1950 [R. 35]; and your appellant has taken the steps required by law in presenting the necessary record on the within appeal.

The jurisdiction of the Court of Appeals is invoked pursuant to Sections 24 and 25 of the Bankruptcy Act (Act of July 1, 1898, as amended, Ch. 541, Secs. 24 and 25, 30 Stat. 533, as amended).

Appellate jurisdiction over this proceeding in bankruptcy vested in the Court of Appeals upon the filing on the 28th day of March, 1950, of the Corrected Notice of Appeal, the appeal being taken by the bankrupt.

II.

Statement of the Case.

This appeal is from an order of the District Court entitled "Order Affirming Referee's Order" dated and entered on the 2nd day of March, 1950 [R. 32, 33]; that order in turn approves and adopts the order of the Referee in Bankruptcy dated and entered on the 8th day of November, 1949 [R. 13 and 14]. The facts in this case are in the main uncontradicted and they are essentially as follows:

That on or about the 22nd day of April, 1948, the bankrupt herein purchased merchandise from Walbrooke Clothes, Inc., in the sum of $730.92; that the terms of the bill were net 60 days and that on or about the 26th day of July, 1948, Walbrooke Clothes, Inc., directed a letter to the appellant herein, requesting payment of the said obligation [R. 42].

That on or about the 29th day of July, 1948, Ellis Wishnow, the local representative of the said Walbrooke Clothes, Inc., called on the appellant herein to discuss the payment of the said obligation [R. 36 and 37]; that pursuant to the request of the said Ellis Wishnow [R. 38], the appellant herein wrote the said Walbrooke Clothes, Inc., and that the contents of the said communication of appellant are set forth as Appellee's Exhibit No. 1 [R. 40 and 41].

That prior to the communication of the 26th day of July, 1948, the said Ellis Wishnow never had occasion to call on the appellant herein for the payment of this obligation [R. 37]; and further that this was the first contact that was ever made for the collection of this past due

debt [R. 43]; and further that the said Walbrooke Clothes, Inc., never communicated by any form their position with regard to this said Appellee's Exhibit No. 1.

It is further undisputed that the said obligation was never paid by the appellant herein and that there was in fact no escrow containing the sum of $12,500 under the control of the appellant herein, or in any sum, or at all.

That subsequent to the appellant's communication, as set forth in the Appellee's Exhibit No. 1, the appellant herein never received any further communication with regard to the payment of this sum; that there was never any threat regarding the institution of any legal proceedings to collect the said sum, nor indeed was any such action threatened; nor was there ever an attachment levied against any of the property or assets of the appellant herein.

That the appellant's uncontradicted testimony was, and his explanation of the figure "$12,500 in escrow" is adequately explained in the record [R. 88 to 91] and does not solicit any explanation at this point.

That the appellee herein filed Amended Specifications of Objections to the Discharge of the Bankrupt [R. 6 to 9] and more particularly Specification No. I in which it is alleged that the said Walbrooke Clothes, Inc., "refrained from pressing payment of the said debt" [R. 7 and 8] and that the said refraining from pressing payment was an act within the perimeter of Section 14(c)(3) of the Bankruptcy Act, for which the Court order denied the discharge of the appellant herein.

III.

Specification of Errors.

THE ORDER OF THE UNITED STATES DISTRICT COURT, AFFIRMING THE REFEREE'S ORDER [R. 32] DENYING THE BANKRUPT'S DISCHARGE, IS ERRONEOUS IN THAT:

(1) The finding of fact and conclusions of law signed by the Referee herein was induced by an erroneous view of the law in the following respects:

(a) In finding that the letter written by the bankrupt to I. Goldberg, Credit Manager for Walbrooke Clothes, Inc., and heretofore introduced into evidence as Trustee's Exhibit "1" is a materially false statement in writing respecting his financial condition, within the meaning of Section 14(c)(3) of the Bankruptcy Act.

(b) In finding that Walbrooke Clothes, Inc., gave an extension or renewal of credit within the meaning of Section 14(c)(3) of the Bankruptcy Act by merely "refraining from placing said account against said bankrupt, held by the said Walbrooke Clothes, Inc., for collection, refrained from suing on the same or pressing the same further in any manner whatsoever until it became necessary for the said Walbrooke Clothes, Inc., to file its claim in this bankruptcy proceeding as a result of the bankrupt's ensuing bankruptcy" [R. 12].

(2) The objections to all findings of fact herein complained of are further based upon the lack of evidence to support the same.

(3) The conclusions of law contained in the said Findings of Fact and Conclusions of Law are contrary to the law and the facts.

(4) The Court erred in refusing to grant the bankrupt a discharge.

IV.

Summary of Argument.

A. A FALSE STATEMENT ON WHICH A BANKRUPT OBTAINS MONEY OR PROPERTY ON CREDIT, WHICH WILL BAR HIS DISCHARGE UNDER SECTION 14(c)(3) OF THE BANKRUPTCY ACT, MUST BE A FINANCIAL STATEMENT AS DISTINGUISHED FROM A MERE MISREPRESENTATION.

(1) A DECISION OF A CREDITOR TO EXTEND OR RENEW CREDIT, THOUGH INDUCED BY A FALSE STATEMENT, CANNOT BE THE BASIS FOR THE DENIAL OF THE DISCHARGE, UNLESS SUCH STATEMENT BE A FINANCIAL STATEMENT AS DISTINGUISHED FROM A MERE REPRESENTATION.

B. THE INACTIVITY OF A CREDITOR AS WITNESSED BY HIS REFRAINING FROM PLACING AN ACCOUNT WITH A COLLECTION AGENCY OR PRESSING THE SAME FOR PAYMENT IN RELIANCE UPON THE DEBTOR'S REQUEST FOR CONSIDERATION OF HIS PERSONAL PROBLEMS IS NOT AN EXTENSION OR RENEWAL OF CREDIT WITHIN THE MEANING OF SECTION 14(c)(3) OF THE NATIONAL BANKRUPTCY ACT.

(1) THE 1926 AMENDMENT TO THE NATIONAL BANKRUPTCY ACT, AND IN PARTICULAR THOSE CHANGES IN SECTION 14(c)(3) WERE NOT INTENDED TO CREATE ANY NEW ACT OR ACTS WHICH COULD BE THE BASIS FOR THE DENIAL OF A DISCHARGE.

(2) THE PROVISIONS OF THE SECTION RELATING TO THE DISCHARGE OF A BANKRUPT ARE TO BE LIBERALLY CONSTRUED IN FAVOR OF THE BANKRUPT AND ARE NOT TO BE EXTENDED BY JUDICIAL CONSTRUCTION.

C. THE FINDINGS OF FACT AND CONCLUSIONS OF LAW MADE BY THE REFEREE AND ADOPTED BY THE JUDGE OF THE UNITED STATES DISTRICT COURT ARE NOT SUPPORTED BY, AND ARE CONTRARY TO, THE EVIDENCE.

V.

ARGUMENT.

Introduction.

The instant appeal raises questions of extreme importance to the administration of the bankruptcy law. It is well settled that the sections dealing with a bankrupt's discharge are to be liberally construed in favor of the granting of the same. This rule of law is many times cited but often overlooked by the courts when applied to a factual situation.

The factual situation here is a simple one. The appellant purchased merchandise on sixty days' credit from Walbrooke Clothes, Inc. Thereafter, when the invoice matured, the creditor requested payment. The creditor's sales representative called on the debtor and requested the said debtor to communicate his difficulties to the creditor. The debtor did so in a letter patently lacking in literary quality and definiteness, and the creditor's conduct from this point was notable only by its consistency of inaction.

This Court, and the courts below, have been asked to determine whether or not the factual situation presented in the form of a letter by the appellant herein was a statement respecting the financial condition of the appellant within the meaning of Section 14(c)(3) and the conduct of the creditor was that of extending or renewing credit.

This Court is familiar with the settled rule of law calling for a liberal construction of the sections of the Bankruptcy Act concerning itself with the discharge of bankrupts in an effort to grant the same.

Appellant submits that in both problems hereinabove posed, the Referee and the Judge of the United States

District Court failed to give the Bankruptcy Act the liberal interpretation required.

Appellant will address itself in this brief to both phases of the problem posed in the appellant's communication on their merits. However, emphasis will also be placed on the evidence submitted to the Referee to show a lack of fraudulent intent as applied to the appellant herein.

A. A False Statement on Which a Bankrupt Obtains Money or Property on Credit, Which Will Bar His Discharge Under Section 14(c)(3) of the Bankruptcy Act, Must Be a Financial Statement as Distinguished From a Mere Misrepresentation.

(1) A Decision of a Creditor to Extend or Renew Credit, Though Induced by a False Statement, Cannot Be the Basis for the Denial of the Discharge, Unless Such Statement Be a Financial Statement as Distinguished From a Mere Representation.

Assuming that there was an extension or renewal of credit, appellant's statement was only a representation as distinguished from a financial statement (see *In re Noble,* 42 Fed. Supp. 684; Remington on Bankruptcy, Sec. 3335).

The property must have been obtained on credit. The mere obtaining of money or other property by false representations, where the money was not loaned or credit otherwise extended, is insufficient to constitute a bar to discharge.

> "The statement contemplated by the provision of the Act here involved is a financial statement, as distinguished from a mere representation. Stated other-

wise, to justify refusal of a discharge, the false statement must concern the financial condition of the bankrupt."

8 *Corpus Juris Secundum,* pages 1425-26 (citing *Johnston v. Johnston,* 63 F. 2d 24, 22 A. B. R. (N. S.) 340, affirming *In re Johnston,* 2 Fed. Supp. 443, and others);

In re Morgan, 267 Fed. 959, 45 A. B. R. 612.

"It is plain that the intention of Congress was not to extend the statute to all cases of false written statements where credit happens to be given, and the thought being to confine the statute to cases where the decision to give credit was induced by the false statement. SUCH STATEMENT MUST BE A FINANCIAL STATEMENT, as DISTINGUISHED from a mere misrepresentation." (Emphasis ours.)

In re Morgan (*supra*).

The elements which must be met to appear to justify a final discharge on this ground are that the bankrupt has obtained money or property on credit on the basis of the materially false *financial* statement or statement as to the bankrupt's financial condition in writing given to the creditor or his representative for the purpose of obtaining credit *on which the creditor relied in granting* credit.

"The phrase 'respecting his financial condition' limits and restricts the false statement, which may defeat the discharge. In short, the false statement must be in respect to the bankrupt's financial condi-

tion. Even before the amendment to this subdivision, the Courts had given the term 'materially false statement' a narrow meaning."

In re: Current 63 F. 2d 640, 641, 23 A. B. R. (N. S.) 29, 31, reversing 59 F. 2d 460, 21 A. B. R. (N. S.) 477.

In *In the Matter of Acme Upholstery Supply Company, also known as Acme Upholstery Fabrics & Supply,* No. 45,232-PH, Referee Benno M. Brink in a decision rendered May 7, 1948, held:

"That a schedule of accounts receivable involved in this matter was not a statement respecting financial condition of the bankrupt partner within the meaning of Section 14(c)(3) of the Bankruptcy Act."

In a recent decision in this circuit, before the Honorable David B. Head, *In the Matter of Joseph F. Langan,* No. *46,283-O'C*, the question presented to the Court was whether there was a false representation by the bankrupt which constituted a "false statement in writing concerning his financial condition." In an erudite decision the Court reviewed very thoroughly the important cases, prior and subsequent to the 1926 Amendment, and cited and approved *Johnston v. Johnston* (*supra*), and *In re Morgan* (*supra*). The *Morgan* case was again cited and approved in the case of *Lockhart v. Edel, et al.,* 23 F. 2d 912, 11 A. B. R. (N. S.) 187, page 190, wherein the Court said:

"A financial statement on which the bankrupt obtained money on credit which will bring the debtor under Bankruptcy Act, Section 14(b)(3) must be a financial statement as distinguished from a mere representation."

In re Morgan (*supra*).

A very important decision on the effect of the 1926 Amendment is the case of *Levy v. Industrial Finance Corporation, et al.,* 276 U. S. 281, 11 A. B. R. (N. S.) 352. In this particular case, the Court declared in a decision rendered by Mr. Justice Holmes that the 1926 Amendment did not apply because of the date of the proceedings. However, most significant is the language contained on page 354 wherein the Court said:

> "The latter amendment, by the Act of May 27, 1926 . . . serves to limit the bars to discharge more narrowly and indirectly to favor the defendant's position by a change of the words to 'materially false statement respecting his financial condition.' "

It is therefore most important to remember that the 1926 Amendment, as the United States Supreme Court declared, was not intended to make it harder to get a discharge but, rather, was intended to provide greater limitations and restrictions on persons asking to have the discharge denied.

It has been argued by the appellee that the appellant's reply to the creditor [R. 40, 41], induced the said creditor to extend or renew credit and that this extension or renewal was granted because of the inaction of the creditor. The Court's attention is specifically directed to the said exhibit and its content. It is obvious from even a cursory examination that the quality of the said letter is not of the material from which great pieces of literature are born. Contrary to anything that has been argued heretofore, this letter clearly shows a bad financial condition rather than

one which would induce a creditor to extend or renew credit as the result of the meaning conveyed.

A comparable situation, where a discharge was granted, was presented to the Court in the case of *Dave Rauch v. Manchester Smith Company, Inc.,* 240 Fed. 687, 39 A. B. R. 484. Here the bankrupt wrote a letter to a creditor nearly six months before the filing of the petition in which he stated that he was

> "perfectly solvent . . . One can hardly realize how conditions are here; in fact, there has been no business hardly at all, and for that reason I have been so pushed. Have just gotten possession of a bankrupt stock, and while I haven't done anything yet, I expect to realize some money out of it. In regard to the order I gave, am not in need of the goods now and you can just hold same for a while yet, and in the meantime I am looking for things to open up."

In *Dave Rauch v. Manchester Smith Company, Inc.* (*supra*), the Court held at pages 485-486 that all of the statements of the letter must be taken together and the intent of the writer inferred from its entire contents:

> "Not only is there no definite representation as to assets or debts, or anything else, but the general assertion of solvency is so qualified by succeeding statements as to deprive it of any seriously misleading import. In short, we think the letter furnishes no evidence of that dishonest purpose to obtain credit which the law declares shall operate to prevent a

discharge. *Franklin v. Monning Dry Goods Co.* (C. C. A., 5th Cir.), 33 Am. B. R. 257, 217 Fed. 929, 133 C. C. A. 601; *Peck Co. v. Lowenbein* (C. C. A., 4th Cir.), 24 Am. B. R. 138, 178 Fed. 178, 101 C. C. A. 498; *In re Cloutier Bros.* (D. C., Me.), 36 Am. B. R. 319, 228 Fed. 569; *Doyle v. First Nat. Bank of Baltimore* (C. C. A., 4th Cir.), 36 Am. B. R. 331, 231 Fed. 649, 145 C. C. A. 535."

In the approach to the question as to whether or not the creditor's conduct, to-wit his inaction was an extension or renewal of credit within the meaning of Section 14(c)(3) of the National Bankruptcy Act, an analagous situation is raised by Section 17(2) of the National Bankruptcy Act:

> "A discharge in bankruptcy shall release a bankrupt from all of his provable debts whether allowable in full or in part, except such as . . . are liabilities for obtaining money or property by false pretenses. . . ."

The cases which most sharply raise the issue as to when the fraud must occur in order that it be classified as non-dischargeable debt have in the main been situations where subsequent to the discharge in bankruptcy the creditor sued on the obligation and the defense of the discharge in bankruptcy was raised and the issue before the Court was then one as to whether or not this was a debt which arose by obtaining money or property by false pretenses. Succinctly, the question posed was as to when the fraud would have to have been committed, in order that the debt be non-dischargeable. The authorities have consist-

ently held that the fraud would have to occur at the time that money or property was obtained.

See *Gerdau Co. v. Radway,* 225 N. Y. Supp. 284, 285, 11 A. B. R. (N. S.) 263, 267.*

See also *Matter of Blakesley,* 27 Fed. Supp. 980, 40 A. B. R. (N. S.) 517, 518:

> "The special master found as a fact that the creditor sold an automobile to the bankrupt, and after its delivery, and after having secured a note therefor by a chattel mortgage thereon, the creditor then obtained a financial statement from the bankrupt. The special

---

*"We find that the defendant obtained the canary seed from the plaintiff upon an agreement to pay the purchase price from the letter of credit furnished by the purchaser. This transaction whereby the canary seed was obtained by the defendant was complete in itself and there is no allegation of fraud in connection therewith. Thereafter, by false representations, the defendant persuaded the plaintiff to cancel the aforesaid agreement to pay from the letter of credit, and to substitute the ninety-day trade acceptance. *But this latter agreement did not bring any property into the possession of the defendant.* The defendant already had the canary seed lawfully in his possession. The complaint thus fails to allege that the defendant obtained the possession of property from the plaintiff by fraud. Hence the obligation is dischargeable in bankruptcy as not within the exception of the Bankruptcy Act, namely a fraud, the result of which is the obtaining of property by false pretenses or false representations. In *Landgraf v. Griffith,* 41 Ind. App. 372, 83 N. E. 1021, the Court said: 'We are of the opinion that the facts set out in the complaint are not such as are contemplated by the statute. The fraud should relate to the obtaining, at the *creation* of the debt, of the money or property by false or fraudulent representations, the original relation between the parties being a contractual one. It "must exist in the creation of the debt, as subsequent fraudulent conduct is insufficient." *Brandenburg, Bankruptcy* (3d Ed.), §435. "If the original debt arose in contract and the fraud was but an incident of the debt and not its creative power, the debt is merged in the judgment and the bankrupt released thereafter." *Brandenburg, Bankruptcy* (3d Ed.), §435. See also, *Collier, Bankruptcy* (5th Ed.), p. 478.'" (Emphasis ours.)

master further found that the bankrupt not only made a statement of his then indebtedness in good faith, but that it was substantially correct at the time made. The evidence as reported by the special master supports these findings of fact. The law is such that the discharge of the debt is not prevented by fraudulent representations made after the goods were purchased and delivered. *Otto Gerdau Co. v. Radway,* 11 Am. B. R. (N. S.) 264, 222 App. Div. 107, 225 N. Y. S. 284, 285."

B. The Inactivity of a Creditor as Witnessed by His Refraining From Placing an Account With a Collection Agency or Pressing the Same for Payment in Reliance Upon the Debtor's Request for Consideration of His Personal Problems Is Not an Extension or Renewal of Credit Within the Meaning of Section 14(c)(3) of the National Bankruptcy Act.

(1) The 1926 Amendment to the National Bankruptcy Act, and in Particular Those Changes in Section 14(c)(3) Were Not Intended to Create Any New Act or Acts Which Could Be the Basis for the Denial of a Discharge.

Section 14(c)(3) provides for a situation in which the discharge of the bankrupt will not be granted:

> "The Court shall grant the discharge unless satisfied that the bankrupt has obtained money or property on credit, or obtained an extension or renewal of credit, by making or publishing or causing to be made or published in any manner whatsoever, a materially false statement in writing respecting his financial condition."

A short history of the Bankruptcy Act, with particular emphasis on this section should be helpful in the consideration of this problem.

In the Bankruptcy Act of 1898, there was no section comparable in any manner with the now present and existing Section 14(c)(3). Clause (3) was added by Act of February 5, 1903. (32 Stat. 797 and in its original form read: "(3) obtained property on credit from any person upon a materially false statement in writing made to such person for the purpose of obtaining such property on credit.") By Act of June 25, 1910, 36 Stat. 838, it was amended as follows: "(3) obtained money or property on credit upon a materially false statement in writing, made by him to any person or his representative for the purpose of obtaining credit from such person." It was finally amended to read as in the text by Act of May 27, 1926, 44 Stat. 662, as follows: "obtained money or property on credit, or obtained an extension or renewal of credit, by making or publishing, or causing to be made or published, in any manner whatsoever, a materially false statement in writing respecting his financial condition."

In view of this legislative history, the courts have consistently held that the import and consequences of this section should not be extended by judicial construction (see Collier on Bankruptcy, 14th Ed., Vol. 1, p. 1356, and cases cited).

It has been argued by the appellee in the courts below that the 1926 Amendment to the Bankruptcy Act was intended to provide for the instant situation in that the Congress added the phrase "obtained an extension or a renewal of credit." It is the position of the appellant that this was not the intention of the 1926 Amendment but rather that the said enactment intended to cover situations

where a debtor made or published a financial statement to credit agencies as distinguished from presenting it to an individual creditor. This phase of the amendment is found in the language of "making or publishing or causing to be made or published in any manner whatsoever a materially false statement in writing."*

The authorities hereinabove set forth prove conclusively and without any reservation that the 1926 Amendment to Section 14(c) of the Bankruptcy Act was promulgated with only one purpose in mind; as set forth in the statement by Mr. Michener.

---

*[See 67 Congressional Record 7526: Report of the Special Committee on Practices in Bankruptcy. The statement of Mr. Michener who explained the reasons of the various 1926 amendments during the debate on the floor of the Congress said: "The commerce of today is transacted almost entirely upon credit. Under present law a false financial statement to be grounds for denying a discharge must be given directly to the complaining creditor or his representative. *The amendatory provision serves to prevent those evasions of law which now occur by having the false statements made to and distributed by commercial agencies.*" (Our emphasis.) See also, 50 Am. Bar Assn. Reports 478, 484. Ralph F. Colin: "An Analysis of the 1926 Amendment to the Bankruptcy Act." (26 Col. Law Review 789-795.) The addition of the clause, "or obtain an extension or renewal of credit by making or causing to be made or published in any manner whatsoever . . . respecting his financial condition" merely codified the case law and the judicial constructions placed on the section as it read prior to the Amendment. See James Angell McLaughlin: "Amendments of the Bankruptcy Act"; 40 Harvard Law Review 341-351; *Ralph F. Colin, supra; In re Waite* (D. Md., 1915), 233 Fed. 853; aff'd *Doyle v. 1st National Bank of Baltimore* (C. C. A. 4th, 1916), 231 Fed. 649; *In re Samet* (D. Md., 1917), 243 Fed. 303; aff'd *Samet v. Farmers and Merchants National Bank* (C. C. A. 4th, 1917), 247 Fed. 669. *Morton v. Snyder,* 20 F. 2d 469; 10 A. B. R. (N. S.) 194.

Even before the Amendment of 1926, the obtaining of an extension of time for payment by false property statement was ground for the denial of discharge. See *Parrish v. City National Bank of Kearney* [C. C. A. Neb. (1929), 32 F. 2d 982; 14 A. B. R. (N. S.) 177. See also *Erickson v. Bicknell* (C. C. A., 1928), 28 F. 2d 729, 12 A. B. R. (N. S.) 639.]

(2) The Provisions of the Section Relating to the Discharge of a Bankrupt Are to Be Liberally Construed in Favor of the Bankrupt and Are Not to Be Extended by Judicial Construction.

Appellant desires to recall to the attention of the Court the historical interpretation both legislative and judicial of the section dealing with the Discharge of Bankrupts. This interpretation has never varied in its consistency in the proposition that legislation dealing with this subject should always be interpreted liberally in favor of granting of the discharge to the bankrupt (see Remington on Bankruptcy, Sec. 3216 and the cases therein cited).

However, appellant submits that the construction of the Bankruptcy Act by the courts below for the reasons hereinabove stated are repugnant to the philosophy of a liberal construction of the Bankruptcy Act in favor of the granting of a discharge to the appellant herein. Indeed, appellant suggests that on the two legal issues hereinabove raised, the most exacting judicial construction was necessary in order to sustain a finding that the appellant's discharge should be denied and that this construction was erroneous.

C. The Findings of Fact and Conclusions of Law Made by the Referee and Adopted by the Judge of the United States District Court Are Not Supported by, and Are Contrary to, the Evidence.

The Findings of Fact and Conclusions of Law [R. 10 to 12] can be summarized very briefly. They are to the effect that the local representative of Walbrooke Clothes, Inc., to-wit: Ellis Wishnow, called on the appellant herein

to inquire about the payment of the obligation and that as a result the said Ellis Wishnow and the appellant herein had conversation [R. 11] concerning the indebtedness, which led to the appellant herein writing a letter to Walbrooke Clothes, Inc. [App. Ex. 1]; that as a result of the said letter, said Walbrooke Clothes, Inc., "refrained from placing said account against said bankrupt, held by the said Walbrooke Clothes, Inc., for collection; refrained from suing on the same or pressing the same further in any manner whatsoever" [R. 12].

Appellant is aware that appellate courts are reluctant to disturb Findings of Fact when they are based on evidence presented to the lower tribunals. However, we submit that the error committed by the lower courts regarding its finding of fact and conclusions of law are so obvious and so contrary to the elementary rules of the fair exercise of discretion that this Court should examine into the same.

The representative of Walbrooke Clothes, Inc., testified that he had never had previous occasion to call on the appellant herein for the payment of the said indebtedness [R. 37]; that on the basis of his discussion with the appellant herein, his only communication to Walbrooke Clothes, Inc., was that the appellant "would probably pay it because he told me he would" [R. 38].

There was testimony that the letter dated July 26, 1948, was the first communication ever addressed to the appellant herein concerning this delinquency [R. 42]. Indeed, it may be commented here that the appellant herein was only delinquent thirty days. There was further testimony again

by the sales representative of the said Walbrooke Clothes, Inc., that after the appellant herein had written the said Walbrooke Clothes, Inc. [Appellee's Ex. I] that nothing was done regarding its contents either verbally or in writing [R. 48].

The testimony of the appellant herein further corroborated the testimony of Mr. Wishnow that the letter of Walbrooke Clothes, Inc., of July 26, 1948, was the first communication he had ever received from the Walbrooke Clothes, Inc. [R. 92].

There was further testimony that the letter was never answered; that there was no subsequent communication; that there was never any attachment nor any threat as to the institution of legal proceedings to collect the same [R. 92].

We may now very well direct our attention to the very core of the problem: The use of the phrase "$12,500 in escrow to be released to me as soon as we can get the Court Order" as predicated in the Findings of Fact and Conclusions of Law, heretofore entered by the courts below, would have us believe that the appellant conjured up this figure and the whole concept of money coming to him from an escrow.

It might very well be said that the appellant in writing to the said Walbrooke Clothes, Inc., did not chose the most qualified literary vein in which to travel. The explanation is not difficult. It is actually very simple. The appellant's uncontradicted testimony [R. 88 to 91] can be summarized

as follows: The escrow of which the appellant speaks was to have resulted from the negotiations which the appellant was conducting with Mr. Dean, Vice-President of the Main Office Branch of the Bank of America. The total escrow was to be in the sum of $12,500, of which the Bank of America would retain $11,500 as its security for the first and second mortgages and the appellant would receive $1,000 as his proceeds from the said escrow and that this money would be used to extinguish his liability to Walbrooke Clothes, Inc. That was the testimony and those are the facts—simple in form, truthful in content, and uncontradicted in presentation. The only possible interpretation to support the position of the appellee as would be that these entire negotiations with the Bank of America were a figment of appellant's imagination and even the appellee below did not attempt to contradict the testimony of the appellant.

If the appellant had said "there will be $12,500 in escrow" as distinguished from "there is $12,500 in escrow" this case would undoubtedly never have arisen and when the issues in this matter have been presented to the Court in their totality, the factual question is one of improper phraseology in appellant's communication.

We suggest that it was to protect debtors in just such a situation that the rule of law, that a financial statement must be relied on by the creditor as distinguished from just any representation, has been enunciated by the courts.

VI.

Conclusion.

The principal points involved in this appeal are:

(1) Was the appellant's letter a materially false statement in writing respecting his financial condition within the meaning of Section 14(c)(3) of the National Bankruptcy Act?

(2) Was the conduct of Walbrooke Clothes, Inc., that is to say its inactivity as related to the appellant herein, an extension or renewal of credit within the meaning of Section 14(c)(3) of the National Bankruptcy Act?

(3) Were the Findings of Fact and Conclusions of Law, as set forth by the Referee and adopted by the Judge of the United States District Court below, based upon evidence sufficient to support the same?

We submit that these questions can only be answered in the negative and further that a liberal interpretation of the sections dealing with the Discharge of a Bankrupt require that the Order Denying the Bankrupt's Discharge should be reversed and we respectfully submit that the bankrupt should be granted his discharge.

Respectfully submitted,

QUITTNER, STUTMAN & SHUTAN,
By FRANCIS F. QUITTNER,
Attorneys for Appellant.

JACK TENNER,
Of Counsel.